In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-916

JAMES LEE STOCKWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial in the United States District Court for the Central District of California, in which petitioner waived his right to a jury, petitioner was convicted on twenty counts of mail fraud in violation of 18 U.S.C. 1341 and 1342. He was sentenced to concurrent terms of three years' imprisonment. The court of appeals affirmed (Pet. App.).

1. The evidence at trial established that petitioner defrauded various credit card companies with credit cards obtained under false names and with other false information.[1] Briefly, this evidence showed that in

[1] Petitioner admits that he was the person who applied for and used the credit cards (Pet. 8).

in Beverly Hills through which everything cleared and that he had already "taken Master Charge for $30,000 plus" (Tr. 89–90).

On cross-examination Giamformaggio testified that, between petitioner's second and third visit to his station, Texaco Security Agent Butts showed Giamformaggio a group of photographs after Giamformaggio had described petitioner to Butts (Tr. 95–96, 100–101). Giamformaggio picked out a photograph of petitioner as the man who had shown him the Texaco credit card bearing the name of James Casino (Tr. 103). In April 1971, after petitioner's arrest but prior to trial, an Assistant United States Attorney and Postal Inspector Collier showed Giamformaggio a number of photographs, including petitioner's (Tr. 99–100, 186, 190).[2]

Postal Inspector Collier testified that before he showed Giamformaggio the photographs, Giamformaggio had given him a physical description of petitioner tallying with the physical description Giamformaggio had given Texaco Agent Butts three years pre-

[2] The photographs that Texaco Agent Butts showed Giamformaggio were unavailable at trial (Tr. 108). The photographs Postal Inspector Collier showed Giamformaggio were marked for identification as Defense Exhibit B and were received in evidence on the court's own initiative (Tr. 184–185, 189–190). Contrary to petitioner's contention (Pet. 7, 13), the photographs were not received in evidence over petitioner's objection. Nor, contrary to petitioner's contention (Pet. 6), was the set of photographs shown Giamformaggio by Butts the same set shown him by Collier, since Collier's set included a photograph of petitioner taken shortly after petitioner's arrest in April 1971, whereas Butts had shown Giamformaggio the set of photographs in 1968 (Tr. 100, 170, 190).

viously (Tr. 190). Collier had included two photographs of petitioner in the display because in one photograph petitioner "had just been arrested and his hair was messed and he looked pretty disreputable," whereas in the second photograph petitioner "is smiling and the hair style is somewhat different" (Tr. 190). When he displayed the eight photographs to Giamformaggio, Collier did not suggest which photograph Giamformaggio should pick out (Tr. 190).

Giamformaggio positively identified petitioner at trial and testified that he would have been able to identify petitioner even if no photographs had been shown him (Tr. 86, 106–107, 184). The trial judge, in denying petitioner's motion to strike all of Giamformaggio's trial testimony as tainted by Collier's photographic display, commented after examining the photographs (Tr. 196–197):

> The objection that we usually find in a case of this kind is that we have * * * the allegation, at least, is that the pictures are of people who are so different that there is only one person that comes anywhere near to being the same, and naturally you would have to pick that one.
>
> * * * That is not the case here.
>
> These pictures are of people who really are quite comparable in appearance. I think his ability to recognize him from these pictures indicates that he has a rather good memory of the appearance of the defendant and his testimony will tend to support this same thing.
>
> It may be a very odd proposition, you might say, being made according to the testimony. I doubt very much if service station operators are

> approached regularly to charge $300 on a credit card, with the assurance that they will get a $100 rebate * * *.
>
> So I can see very well why a person would remember someone who would do that.

2. Petitioner contends that the pre-trial photographic display shown by Postal Inspector Collier was impermissibly suggestive because the display contained two photographs of petitioner. But as the court below held, the inclusion of these two, dissimilar phototographs of petitioner in a display of eight photographs shown to Giamformaggio did not "give rise to a very substantial likelihood of irreparable misidentification" (*Simmons* v. *United States*, 390 U.S. 377, 384) when considered in light of "the totality of the circumstances." *Stovall* v. *Denno*, 388 U.S. 293, 302. Here, numerous witnesses, including friends and business associates of petitioner, identified petitioner as the person who obtained and used a credit card under the names of James Casino, which was the name on the credit card shown to Giamformaggio by the person with whom Giamformaggio conversed on three occasions. Hence, the trial court, after examining Collier's photographic display, properly rejected petitioner's motion that these two photographs in a spread with six other similar photographs rendered inadmissible Giamformaggio's in-court identification. See *United States* v. *Smith*, 452 F. 2d 638 (C.A. 4), certiorari denied, 406 U.S. 910. Moreover, as the trial court noted (Tr. 196–197), the unusual nature of petitioner's offer to Giamformaggio supports Giamformaggio's testimony (Tr. 184) that he would have

identified petitioner in court even if no photographs had been shown him.[3] This is an area where "great weight must be given to the determination of the judge who saw and heard the witness," *United States ex rel. Phipps* v. *Follette*, 428 F. 2d 912, 915 (C.A. 2), and the court of appeals properly affirmed the district court's judgment in this regard. See also *Clemons* v. *United States*, 408 F. 2d 1230, 1252 (C.A. D.C.).

With respect to the photographs shown by Texaco Agent Butts to Giamformaggio, petitioner's third visit to the service station, when Giamformaggio told petitioner that Texaco had a file on him, occurred after Butts had displayed the photographs and shows that the witness did not rely on his photographic identification when he identified petitioner in court.[4]

3. Petitioner contends that his conviction impermissibly rests on uncorroborated extrajudicial admissions. But statements made in furtherance of a scheme are not equivalent to admissions made to the police after the crime has been completed. And even apart from these statements, the evidence recited above

[3] There is no need to defer consideration of this petition until after this Court's decision in *United States* v. *Ash*, No. 71-1255, since petitioner has never raised the issue of deprivation of counsel during the photographic display, which is the issue involved in *Ash*.

[4] In any event, Butts was not a government agent. Butts' photographic display, the content of which was never revealed at trial (Tr. 195), was different from that of Inspector Collier. Butts' display, which apparently contained only one photograph of petitioner, was shown to Giamformaggio in 1968, whereas Collier's display included a 1970 photograph (Tr. 100, 170, 190).

clearly showed petitioner's involvement in the fraudulent scheme.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973